LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
AUG 15 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969
No. 473

LYN-BEV DEVELOPMENT, INC.,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK, etc., *et al.,*
Respondents.

Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, of the State of California.

TYLER ABELL,
1225 19th Street, N.W.,
Washington, D.C. 20036,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	4
How the Federal Question Was Raised and Decided Below	5
Reasons for Granting the Writ	7
Conclusions	9

INDEX TO APPENDICES

Appendix A. Opinion of the Court of Appeal	1
Appendix B. Modification of Opinion	11
Appendix C. Minute Order	13
Appendix D. Section 1 of the Fourteenth Amendment to the Constitution of the United States	14
Appendix E. Article I, Section 13 of the Constitution of the United States	15
Appendix F. Section 527 of the California Code of Civil Procedure	16

TABLE OF AUTHORITIES CITED

Cases	Page
Armstrong v. Manzo, 380 U.S. 545	7
Kapelus v. Franklin, 377 F. 2d 815	3
Sniadach v. Family Finance Corp. of Bay View, 89 S. Ct. 1820	2, 7, 8
Thompson v. Magnolia Petroleum Co., 309 U.S. 478	3
Statutes	
California Code of Civil Procedure, Sec. 527	3
California Constitution, Art. I, Sec. 13	3
United States Code, Title 11, Sec. 1	3
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Fourteenth Amendment, Sec. 1	3

IN THE

Supreme Court of the United States

October Term, 1969
No. .....

LYN-BEV DEVELOPMENT, INC.,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK, etc., *et al.*,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, of the State of California.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal, 4th Appellate District, of the State of California, entered in the above-entitled case on March 21, 1969, and modified on April 9, 1969 at which time a Petition for Rehearing was denied. A Petition for Hearing in the Supreme Court of the State of California was denied, without hearing, on May 14, 1969.

Opinion Below.

The opinion of the Court of Appeal, 4th Appellate District, Division Two, State of California, was certified for non-publication and hence was unpublished as was the denial of the Petitions for Rehearing in said Court and the Supreme Court of California.

Jurisdiction.

The Judgment of the Court of Appeal, 4th Appellate District, State of California, was made and entered on March 21, 1969. A petition for rehearing was denied on April 9, 1969, at which time the opinion was modified. This opinion, as modified, became final on May 14, 1969, when the Supreme Court of the State of California summarily denied a Petition for Hearing. A copy of the March 21, 1969 opinion, the modification of opinion of the Court of Appeal, and of the denial of hearing of the California Supreme Court are appended to this Petition, as Appendices A, B and C, respectively. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3). (See *Sniadach v. Family Finance Corp. of Bay View,* .... U.S. ...., 89 S. Ct. 1820 (1969).

Question Presented.

Was appellant denied the use of and title to its property without due process of law.

(1) On February 3, 1967, petitioner filed a lawsuit in the Orange County Superior Court and at that time obtained an *ex parte* temporary restraining order and order to show cause *re* preliminary injunction, both prohibiting respondents below from completing a trustee's sale on petitioner's sole asset.

(2) The order to show cause was called for hearing February 24, 1967 at 10:30 A.M. At about 11:15 A.M. all parties were *excused* by the Court from further attendance until the afternoon session of Court. Inasmuch as petitioner's counsel was scheduled to sit as judge *pro tempore* in another court to impose sentence in a criminal matter at 1:30 P.M., the Court had ordered

the matter to be heard "when all counsel could be present".

(3) At 1:50 P.M., the Court, apparently forgetting that it had continued the matter until "all counsel could be present", called the matter in the absence of petitioner or its counsel, dissolved the temporary restraining order and denied the requested preliminary injunction, thereby permitting respondents below to proceed with the previously restrained trustee's sale. This not only deprived petitioner of title to its property but also thereby its right to avail itself, its creditors, and its shareholders of the benefits of the Bankruptcy Act of 1938, as amended.[1] (11 U.S.C. § 1).

Statutes Involved.

The pertinent statutes involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States; Article I, Section 13 of the Constitution of the State of California; and Section 527 of the California Code of Civil Procedure, which are set forth in Appendices D, E and F respectively.

---

[1]While the Bankruptcy Act gives the referee in bankruptcy power to resolve adverse claims to real property by means of summary proceedings, *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), this power may only be invoked when the property in question is in the possession of the bankrupt or the bankrupt is in title. *Kapelus v. Franklin*, 377 F. 2d 815 (1967) Petitioner's referee (case no. 14538-R, U.S. District Court, Central District of California) held that he had no jurisdiction to set aside the trustee's sale since he found that no one was in possession of the unimproved land involved herein and that petitioner was not the record owner. Thus he could not approve an offer to purchase the land at a price of $330,000.00, $136,000.00 in excess of the amount paid at the trustee's sale. This $136,000.00 would have paid all unsecured creditors and would have given the shareholder a small return on his investment.

Statement of the Case.

Petitioner had borrowed the sum of $175,000.00 from respondents below, Commercial National Bank and Century Bank (hereinafter collectively "respondents"), giving as security therefore a trust deed to the sole asset of petitioner (a 23.45 acre parcel of unimproved land). As a condition of said loan, petitioner was required to maintain "compensating balances" in the amount of $50,000.00 with respondents. Since petitioner had no money or assets other than the land, respondents each "loaned" petitioner the sum of $25,000.00 at 7% interest and required as security for that loan that petitioner purchase interest-free certificates of deposit (hereafter "Certificates") in like amounts from each respondent. The trust deed was of an all-inclusive type and thus also secured each $25,000.00 loan.

In September, 1966, respondents began proceedings to effect a non-judicial foreclosure of the property secured by the trust deed. Shortly thereafter, each respondent offset its Certificate against the $25,000.00 loans made to create them, and each filed suit against petitioner and its guarantors for interest and attorneys' fees allegedly due on said $25,000.00 loans.

Petitioner, contending that the so-called $25,000.00 loans were shams, that it and its guarantors were being unduly harassed by respondents separate lawsuits and the foreclosure sale, that the notices of default and of election to sell contained serious defects, and that the offset of the Certificates vitiated the effectiveness of said notice of default, filed a suit for declaratory relief and an injunction on February 3, 1967. On that day, petitioner obtained a temporary restraining order and order to show cause *re* preliminary injunction against

respondents' proceeding with their foreclosure sale. The scheduled hearing on the order to show cause was continued to 10:30 A.M. on February 24, 1967. At approximately 11:05 A.M., petitioner's counsel inquired of the Court as to the time when the matter might be heard. The Court stated that it could not be heard that morning. Petitioner's counsel informed the Court that he would be sitting as judge *pro tempore* in a criminal matter that afternoon. After a lengthy discussion, the Court continued the matter to the afternoon "when *all* counsel could be present."

Despite the above facts, the trial court considered the matter at approximately 1:50 P.M. in the absence of petitioner and its counsel, denied petitioner's request for a preliminary injunction, and dissolved the temporary restraining order previously issued by it, thereby permitting respondents to consummate their foreclosure sale at 2:00 P.M., approximately 12 minutes before petitioner's counsel returned to court.

How the Federal Question Was Raised and Decided Below.

Immediately after petitioner's counsel returned to Court in the afternoon of February 24, 1967, he discussed the prior proceedings with the presiding law and motion judge and attempted *ex parte* to have the trustee's sale set aside and to obtain a hearing on his requested preliminary injunction. On the next court day, February 27, 1967, petitioner filed two motions to that end (a notice of motion to set aside sale of real property on the trustee's sale and a notice of motion to set aside the oral default order denying injunction, oral default order dissolving temporary restraining order and

for granting a hearing on the merits). In one of petitioner's declarations supporting said motions, it contended that the procedure described had deprived petitioner of its property without due process of law.

The motions were heard and denied on March 15, 1967. On May 16, 1967, petitioner moved for reconsideration and informed the court that it had been prepared on February 24, 1967 to file a petition under Chapter XI of the Bankruptcy Act and to have a federal temporary restraining order issued therein in the event the state court indicated it was prepared to rule against petitioner. Petitioner also disclosed that certain misrepresentations of one respondent had led a prospective bidder to be absent from court and the trustee's sale that afternoon. This motion for reconsideration was denied on May 15, 1967 and thereafter petitioner unsuccessfully appealed in the Court of Appeal of the State of California.[2]

The major issue raised by petitioner on its appeals below was that it was denied due process of law by the method of the trial court's dissolving its temporary restraining order. The court below held that petitioner was not denied the use of or title to its property on February 24, 1967 without due process of law. It held that petitioner's counsel was granted a hearing on the merits of its argument to obtain a preliminary injunction on March 15, 1967, and that petitioner did not demonstrate how it was prejudiced by the fact that the hearing on the merits was held March 15, 1967, when petitioner was no longer in title, rather than on Feb-

[2]This bidder intended to bid at least $200,000.00, and see footnote #1 where a bid of $330,000.00 was received in Bankruptcy Court.

ruary 24, 1967. In reaching its decision, the court distinguished the case of *Armstrong v. Manzo,* 380 U.S. 545 (1965).

Reasons for Granting the Writ.

The decision of the Court of Appeal, 4th Appellate District, State of California, should be reviewed for the following two reasons:

1. It is contrary to this Court's recent decision in *Sniadach v. Family Finance Corporation of Bay View, et al.,* .... U.S. ...., 89 S. Ct. 1820 (1969).

2. If there is to be any procedural due process whatsoever, counsel must be able to rely upon statements of the Court pertaining to such matters as scheduling, recesses and continuances.

I.

Sniadach v. Family Finance Corporation of Bay View, et al., supra, was decided by this Court on June 9, 1969. Hence, the Supreme Court's thinking was not available to the California courts at the time they ruled on the instant case. *Sniadach v. Family Finance* involved the attachment of wages immediately upon the filing of a lawsuit but before any hearing was held on the merits. The court ruled:

> ". . . Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing.

In his concurring opinion, Mr. Justice Harlan stated:

> ". . . I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claims against the alleged debtor *before* he can be deprived of his property or its unrestricted use."

Denial of the preliminary injunction and the dissolution of petitioner's temporary restraining order effectively deprived petitioner of the use of and title to its only asset. While it is true here, just as it was in the *Sniadach* case, that petitioner, by reason of the *lis pendens* it recorded February 3, 1967, may ultimately recover the unrestricted use of its property, nevertheless, by the fact that it is now out of title, it has now been prevented for over two years from obtaining the benefits of the Bankruptcy Act which would otherwise have been available to it. Were these benefits available to petitioner, all of its creditors (not just respondents) would have been paid in full and its shareholder would not have been deprived of his investment in petitioner.

2.

Counsel for petitioner herein, both below and appearing before this court, had been admitted to the bars of the State of California and the District of Columbia for over 10 years. In that period of time, neither of them has ever read a case reporting a factual situation like that involved herein, or in fact have they even heard of such a situation mentioned. Petitioner suggests that the reason for this fact is that, fortunately, in a country governed by a Constitution which requires due process of law, such factual situations are nearly unique. It takes no imagination to foresee the pandemonium that could ensue in the administration of justice if all courts are not compelled to honor their commitments.

Petitioner represents that the orderly administration of justice demands the ability of litigants to rely upon statements and representations of courts, not just in

the case at bar, but in all pending and future litigation. In this day when "Law and Order" is a national issue, it is imperative that we have judicial order, and that our judges' actions be beyond reproach. Petitioner suggests that the non-judicial conduct of the trial court, not corrected by the reviewing courts, in contravention of statute caused petitioner to lose its property WITHOUT due process of law.

Conclusions.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

TYLER ABELL,
Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Second Division, State of California.

Lyn-Bev Development, Inc., Plaintiff and Appellant, vs. Commercial National Bank, etc., et al., Defendants and Respondents. 4 Civil 8993.

Filed: March 21, 1969.

APPEAL from an order entered March 15, 1967 in the Superior Court in and for the County of Orange. Herbert S. Herlands, Judge. Order affirmed with instructions.

Pagter & Lumsdon, and Ralph G. Pagter, for Plaintiff and Appellant.

Joye & Comstock, and John M. Joye, for Defendant and Respondent Commercial National Bank.

Goodstein & Moffitt, and Harry M. Snyder, for Defendant and Respondent Century Bank.

We have determined that plaintiff Lyn-Bev Development, Inc., the sole appellant, has not been prejudiced or denied due process of law by the trial court's action in vacating a previously entered order vacating an order of default and giving a full hearing on the order to show cause and request for preliminary injunction. Further, there was no abuse of discretion in the denial of the motion to set aside the trustee's sale.

On March 9, 1965, plaintiff Lyn-Bev Development, Inc., (a California corporation) desired to borrow the sum of $175,000 to pay off an encumbrance on a 23.45 acre parcel of unimproved land located in Orange County. On that date defendant Commercial National Bank

(Commercial) loaned plaintiff $100,000 and defendant Century Bank (Century) loaned plaintiff $75,000. Both loans were secured by a deed of trust and the notes were made payable on or before March 16, 1966. As a condition to obtaining the loans, each bank required plaintiff to maintain compensating balances in the amount of $25,000 and since plaintiff had no assets, other than the parcel of land, Commercial and Century each loaned plaintiff $25,000 (total $50,000) and required, as security, that plaintiff purchase interest free certificates of deposit for the amounts of the loans. On March 19, 1966, plaintiff and defendant banks agreed to renew the loans for an additional period of six months.

On September 22, 1966, with the plaintiff in default on the payment of the principal sum ($175,000) and in arrears on the interest due from July 15, 1966, Century, acting for itself and as trustee for Commercial, recorded a Notice of Default and Election to Sell under the terms of the deed of trust. On January 13, 20 and 27, 1967, it published a notice of trustee's sale. The notice of sale set the sale date for February 6, 1967.

Century had previously terminated its compensating balance loan on October 12, 1966 and on November 1, 1966 filed suit against plaintiff for interest due thereon in the sum of $676.41. The suit was later dismissed by Century. Prior to October 12, 1966, Commercial terminated its compensating balance loan and on January 11, 1967 filed suit against plaintiff for the interest due in the sum of $627.08. In connection with the action, Commercial attached the 23.45 acre parcel of land. This suit was also dismissed prior to answer or appearance by plaintiff.

On February 3, 1967, plaintiffs filed a complaint in the Superior Court of Orange County, alleging four causes of action: (1) declaratory relief; (2) injunctive relief to prevent sale of the real property pursuant to the power of sale; (3) quiet title; and (4) slander of title. It is not before this court as to why parties other than plaintiff Lyn-Bev Development, Inc. were parties plaintiff. Plaintiffs filed and recorded a *lis pendens*. An *ex parte* temporary restraining order was obtained enjoining sale of the subject property at the scheduled time and a hearing on the order to show cause *re* preliminary injunction was set for February 17, 1967. On February 17, the matter was continued to February 24, 1967 at 10:30 a.m. with the temporary restraining order remaining in full force and effect.

The order to show cause came on for hearing in Department 19 at 9:00 a.m. at which time it was transferred to Department 3. Court reconvened in Department 3 at 1:45 p.m. on February 24 and the order to show cause was called for hearing. Counsel for Commercial and Century announced their appearances, however, no appearance was made by counsel for plaintiffs and the court thereupon discharged the order to show cause, denied the request for preliminary injunction and ordered the temporary restraining order dissolved. At 2:00 p.m. on February 24, the real property was sold pursuant to the power of sale contained in the deed of trust.

On February 27, 1967, plaintiffs filed two motions. The first was entitled "Motion to Set Aside Sale of Real Property on the Trustee's Sale." The second was a "Motion to Set Aside the Default Order Denying Injunction, Default Order Dissolving Temporary Restrain-

ing Order and for Granting a Hearing on the Merits." Commercial filed Points and Authorities in opposition and on February 28, 1967, filed a demurrer to plaintiffs' complaint.

On March 7, 1967, Century also filed a demurrer to the complaint. Both demurrers were heard on March 11, 1967, and at that time the court overruled the demurrers to the first and third causes of action (declaratory relief and quiet title) and sustained the general demurrers as to the second and fourth causes of action (injunctive relief and slander of title).[1]

On March 15, 1967, Judge Herbert S. Herlands granted the motion to set aside the default order of February 24 and considered the other matters raised in plaintiffs' motions on the merits. After an extensive hearing, the court denied plaintiffs' motions except insofar as it had granted plaintiffs a hearing on the merits. On May 15, 1967, a hearing was held on plaintiffs' motion to reconsider. The motion was denied.

On June 20, 1967, *only* plaintiff Lyn-Bev Development, Inc. filed a notice of appeal from "the Minute Order filed March 15, 1967 denying plaintiff's motion to Set Aside Sale of Real Property on Trustee's Sale."

Defendant Century first urges that the above order is not appealable on the ground that it is merely an interlocutory order prior to judgment not made specifically appealable by Code of Civil Procedure, § 963. This contention appears to be meritorious since plaintiffs in the main action are seeking declaratory relief. How-

---

[1]According to defendant Century a minute order made March 10, 1967 incorrectly reflects that defendants' demurrers to the fourth cause of action were overruled and that that minute order will be corrected *nunc pro tunc*.

ever, since the orders dissolving the temporary restraining order and refusing the preliminary injunction were part of the same minute order and are appealable (Code of Civil Procedure, § 963; Witkin, Calif. Proc., § 36, p. 879), the matter will be treated as properly before this court.

On this appeal it is urged that: (1) plaintiff was denied due process of law in the proceedings below; and (2) the court abused its discretion in denying the motions to set aside the trustee's sale and the order dismissing the temporary restraining order and denying the request for a preliminary injunction.

On February 24, 1967, when counsel for plaintiff failed to appear at the hearing on the order to show cause, apparently unknown to the court, the reason for the absence of plaintiff's counsel was that he was sitting as a judge pro tempore in another department of the same court. This fact was later revealed and, consequently, Judge Herlands on March 15 informed all counsel that he intended to set aside the default order and hear the entire matter on the merits. He indicated that this did not mean that he intended to set aside the trustee's sale automatically, or that he would set aside the order dissolving the temporary restraining order or the order denying the preliminary injunction but only that he was granting plaintiffs the hearing on the merits which they did not receive on February 24. Such a hearing on the merits was held on March 15.

Judge Herlands correctly ruled that the default entered February 24 be set aside since it obviously resulted from a breakdown in communication between court and plaintiffs' counsel. Plaintiff now argues that it was

denied due process of law on February 24 and that this error could not be cured by the actions taken by Judge Herlands. However, at the March 15 hearing the court fully informed plaintiffs of what it intended to do and instead of contending, as it is now urged, that it was in some manner prejudiced by the fact that its motions were being heard on the merits after the trustee's sale, plaintiffs raised no objection to the procedure suggested by the court, fully participated in the hearing and extensively argued the matters raised on the merits. Moreover, on appeal, plaintiff Lyn-Bev has not affirmatively demonstrated in what manner, if any, it was prejudiced by the fact that the hearing on the merits was held March 15 rather than February 24. In view of the fact that a *lis pendens* had been filed, it is clear the trial court could consider the merits without being influenced by the trustee's sale.

To sustain its contention that due process of law was denied on February 24, 1967, plaintiff Lyn-Bev cites *Armstrong v. Manzo,* 380 U.S. 545, 552 [85 S. Ct. 1187]. In that case the Supreme Court of the United States stated:

> "A fundamental requirement of due process of law is 'the opportunity to be heard.' *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew."

In *Armstrong,* the burden was upon the respondent to prove petitioner had failed to contribute financially to the support of his natural child for a period of two

years or more. Petitioner was never notified of the petition for adoption by the stepfather. When he learned of the decree granting adoption, he moved the court to to set aside the decree. The court granted him a hearing on his motion but did not vacate the adoption decree. Thusly, upon hearing the motion, the burden of proof rested upon petitioner in the *Armstrong* case rather than upon the respondent to prove he had given financial support to his natural child. It was upon this factual situation that the Supreme Court held that due process of law was denied to the natural father.

Applying the due process definition stated in *Armstrong* to the facts at bench, we must conclude that due process was not denied plaintiff. On March 15, Judge Herlands *vacated* the default order, thus permitting plaintiff to present evidence and argument to him as it would have been presented on February 24. This it did. Hence, plaintiff was not prejudiced by the ruling of the trial court on March 15, for the same burden of proof rested upon it on that date as on February 24. This distinguishes *Armstrong* from the instant appeal.

The contention of defendant Commercial that the trial court had no jurisdiction to order a restraining order or grant an injunction under Title 12 U.S.C. § 91; *Pacific Nat. Bank v. Mixter*, 124 U.S. 721, 727 [8 S.Ct. 718]; *Dennis v. First Nat. Bk. of Seattle*, 127 Cal. 453, is thus irrelevant. Although the trial court did not have jurisdiction to issue such orders against defendant Commercial, a national bank, it did have jurisdiction to issue such orders against defendant Century, a state bank. Century was the trustee named in the deeds of trust and it was the trustee's

acts which were restrained and against which the injunction was sought. If the restraining order had progressed into an injunction against the state bank, as trustee, the defendant national bank could not have forced the sale.

Plaintiff also urges that the court abused its discretion in failing to set aside the trustee's sale and the order dismissing the temporary restraining order and in refusing the request for a preliminary injunction.

The granting or denying of a temporary restraining order or a preliminary injunction lies in the sound discretion of the trial court. (*People v. Gordon,* 105 Cal. App. 2d 711, 712; *Killeen v. Hotel and R. Emp. etc. League,* 84 Cal.App.2d 87, 95; *Gray v. Bybee,* 60 Cal.App. 2d 564, 569.) Also, a motion to vacate a sale rests largely in the discretion of the trial court and a showing of clear abuse must be made before such order would be reversed. (*Humboldt etc. Society v. March,* 136 Cal. 321, 323; *Butterfield v. Tietz,* 247 Cal. App. 2d 483, 485-486.)

When a party seeks to set aside a trustee's sale, a prerequisite is that such party do equity by tendering the amount of the debt due. (*Crummer v. Whitehead,* 230 Cal.App. 2d 264, 268 and cases cited therein.) Plaintiff herein has not made such tender and in such circumstances it cannot be said that the court below abused its discretion.

Judge Herlands fully considered the arguments and points and authorities in support of plaintiff's con-

tentions concerning the legal effect of the prior actions commenced by the defendants for interest on the compensating balance loans in relation to Code of Civil Procedure, § 726. His conclusion that these arguments were without merit and thus would not support the issuance of a preliminary injunction was not an abuse of discretion.

Defendants Commercial and Century pray this court fix and award attorneys' fees for the work done on this appeal. The notes secured by the deeds of trust have been made a part of the record on appeal and each provides for an award of reasonable attorneys' fees incurred by the holder on account of collection "whether or not suit is filed hereon." It cannot be questioned that it was necessary for defendant banks to employ counsel to protect their legal position as beneficiaries and creditors in the enforcement of the principal obligations.

"A contract for a reasonable attorney's fee in enforcing its provisions embraces an allowance for legal services rendered upon appeal as well as during the trial. (*Hahn v. Hahn,* 123 Cal.App. 2d 97, 103.)" (*Wilson v. Wilson,* 54 Cal. 2d 264, 272; *Dankert v. Lamb Finance Co.,* 146 Cal.App. 2d 499, 503-504; *Cirimele v. Shinazy,* 134 Cal.App. 2d 50, 52.)

Accordingly each of the defendant banks is entitled to attorneys' fees on this appeal, and it appears that Seven Hundred and Fifty Dollars $750.00 is a reasonable sum to be allowed the attorneys for Commercial

and a like amount to be allowed for the attorneys for Century.

The order appealed from is affirmed. Plaintiff is ordered to pay each defendant the attorney's fee of Seven Hundred and Fifty Dollars ($750.00).

McCabe, *P. J.*

We concur:

Kerrigan, *J.*

Tamura, *J.*

Certified for nonpublication, Rule 976.

McCabe, *P. J.*

Kerrigan, *J.*

Tamura, *J.*

APPENDIX B.

Modification of Opinion.

Court of Appeal, State of California, Fourth Appellate District, Division Two.

Lyn-Bev Development, Inc. vs. Commercial National Bank, Etc., Et Al. 4 Civ. No. 8993.

BY THE COURT:

The beginning sentence of the last paragraph on page 3 of our Opinion, which begins with "The Order to show cause" and ends in "called for hearing" is hereby ordered stricken and the following inserted, therefore:

> The order to show cause came on for hearing in Department 19 at 9:00 A.M., at which time it was transferred to Department 3. In Department 3, plaintiffs' counsel inquired of the court as to when the matter would be heard. The court stated it could not be heard that morning. The court was informed by plaintiffs' counsel that he would be sitting as a judge pro tempore in a criminal matter in the afternoon of February 24. After a lengthy discussion the court continued the matter to the afternoon when all counsel could be present.

The following words are stricken from the last paragraph of page 5:

> "apparently unknown to the Court,"

And the following words inserted therefor:

> "apparently forgotten by the court,"

As modified, the Order appealed from is affirmed and the petition for rehearing denied.

The modifications set out, above, do not alter the Judgment expressed in the opinion, nor is the appellant prejudiced by them.

Dated April 9, 1969.

McCabe, *P. J.*

Copies to: Hon. H. S. Herlands, Santa Ana, 92701. Pagter & Lumsdon, 800 S. Brookhurst, Anaheim, 92804. Joye & Comstock, 7920 Orangethrope Ave., Buena Park 90620. Goodstein & Moffitt, IBM Bldg., 3424 Wilshire Blvd., L. A. 90005. Report of Decisions, (2).

APPENDIX C.

Minute Order.

Clerk's Office, Supreme Court, 4250 State Building.

San Francisco, California 94102

May 14, 1969.

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 4 Civ. No. 8993 Lyn-Bev Development Co. vs. Commercial National Bank.

Respectfully,

William I. Sullivan,
Clerk.

APPENDIX D.

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E.

Article I, Section 13 of the Constitution of the United States.

§ 13. *Criminal cases; speedy and public trial; process for witnesses; appearance and defense; counsel; double jeopardy; self-incrimination; due process; failure to explain or deny; depositions.*

Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (Amended Nov. 6, 1934.)

APPENDIX F.

Section 527 of the California Code of Civil Procedure.

§ 527. [*Time for granting injunction; service, preliminary injunction, notice, readiness for hearing, continuance, counter-affidavits and precedence.*]

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith.

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than [1] *15* days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and author-

ities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.